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INTERNATIONAL COUNTERTRADE

Draft Legal Guide on International Countertrade Transactions

Report of the Secretary-General

Addendum

VIII. PARTICIPATION OF THIRD PARTIES

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[Editorial note: The present draft chapter VIII is a revision of draft chapter VIII, "Participation of third parties", published as document A/CN.9/WG.IV/WP.51/Add.1. The note in square brackets at the beginning of each paragraph indicates either the number under which the paragraph appeared in document A/CN.9/WG.IV/WP.51/Add.1 or that the paragraph is new. The revisions of paragraphs that appeared in document A/CN.9/WG.IV/WP.51/Add.1 are underlined. An asterisk indicates the place where text has been deleted without adding new language. An asterisk indicates the place where text has been deleted without adding new language.]

A. General remarks

1. [1] This chapter deals with cases in which a party, instead of itself purchasing or supplying goods in a particular direction, engages a third party to do so. Section B discusses the case in which a party originally committed to purchase goods engages a third party to make those purchases. Section C discusses the case in which a third party is designated to supply goods.

2. [1] This chapter also discusses cases in which a supplier of goods in one direction does not assume a commitment to purchase goods in the other direction, but instead a third-party purchaser assumes such a commitment from the outset of the transaction; such cases are dealt with in section D. Section D also discusses cases in which a purchaser of goods in one direction does not assume a commitment to supply goods in the other direction, but instead a third-party supplier assumes such a commitment from the outset.

[Some of the substance of paragraph 2 as it appeared in A/CN.9/WG.IV/WP.51/Add.1 was moved to paragraph 5.]

3. [3] Cases in which the party committed to purchase goods makes those purchases itself and then resells the goods are not within the subject-matter of this chapter, since those cases are not specific to countertrade. Various restrictions that may be placed on the resale of countertrade goods are discussed in chapter X.

B. Purchase of countertrade goods

4. [4] A party committed to purchase goods frequently cannot use the goods to be purchased, or lacks the marketing capacity or knowledge necessary to resell them. In these cases the party committed to purchase may wish to engage one or more third parties to make the purchases necessary to fulfil the commitment. The third party may be, for example, an end-user of the goods or a trading company specializing in the purchase and resale of certain types of goods.

5. [new paragraph] This section discusses only cases where the third party is to enter into a purchase contract with the supplier. Not discussed are cases in which the party committed to purchase engages a third person to perform the service of locating persons to whom the goods could be resold or the service of representing the committed party in the resale of the goods. Such services performed by a third person, which are not specific to

countertrade, do not affect the rights and obligations of the parties under the countertrade agreement and are therefore not a matter to be addressed in that agreement.

6. [5] A third-party purchaser who agrees to become involved in the countertrade transaction makes a commitment to the party originally committed (i.e., only to the party who engages the third party) to purchase goods from the supplier within an agreed period of time. In some cases, the third party also makes a commitment to the supplier to enter into future contracts. Since the third party's commitment relates to the conclusion of future contracts, that commitment would address issues such as the type, quality, quantity and price of the goods to be the subject of the future contracts, period for fulfilment of the commitment, restrictions on resale of the goods, security for performance, liquidated damages or a penalty, and settlement of disputes. While the third party's agreement to enter into a future contract with the supplier may address the same type of issues as are addressed in the countertrade agreement between the supplier and the party originally committed, the content of the solutions in the two agreements would not necessarily be the same. Different solutions might be adopted, for example, as to security for performance, liquidated damages or a penalty, the applicable law or the settlement of disputes. (Implications of the commitment by the third party are discussed below in paragraphs 17 and 18; the terms of the third party's commitment are discussed below in paragraph 22.)

7. [6] When a third-party purchaser is to be engaged, it is often the case that payment obligations under the supply contracts in each direction are to be settled independently. Such cases do not raise payment issues specific to countertrade. It may be agreed, however, to link payment in the two directions so that the proceeds of the supply contract in one direction are used to pay for the supply contract in the other direction. For a discussion of such linked payment mechanisms, see chapter IX, "Payment", paragraphs 68 and 76.

8. [7] Sometimes the parties to the countertrade agreement agree that the party making purchases beyond what is required to liquidate its outstanding countertrade commitment will be allowed to have the excess fulfilment credit counted towards fulfilment of countertrade commitments that the purchaser may have to assume in the future. Alternatively, a purchaser accumulating such excess fulfilment credit may be permitted to transfer the excess fulfilment credit to a third party (for a discussion of fulfilment credit, see chapter IV, "Countertrade commitment", paragraphs 31 to 34). The transfer of the fulfilment credit to a third party would entitle that third party to sell goods to the party who originally granted the fulfilment credit and to reduce any countertrade commitment by the amount of the transferred fulfilment credit. Such a transfer may involve the payment of a fee by the third party to the transferor of the fulfilment credit. In some countries, special regulations exist on the right of transfer of countertrade credit (e.g., restricting the types of exports that can generate transferable credits, the types of parties to whom countertrade credit may be transferred, the types of imports against which transferred credits may be applied, or requiring specific authorization).

1. Countertrade agreement

9. [8] When the parties at the outset of the transaction foresee the possibility that the party committed to purchase will wish to engage a

third-party purchaser, it is advisable to address that possibility in the countertrade agreement. Provisions concerning a third-party purchaser are particularly advisable when, as described in the next paragraph, the parties might have differing expectations as to whether the purchaser is free to engage a third-party purchaser.

10. [new paragraph] If the countertrade agreement does not address the participation of a third-party purchaser in the fulfilment of the countertrade commitment, the issue may arise between the parties as to whether the party originally committed to purchase is free to engage a third party to make the purchases. The solution to the issue would in many national laws be found in general principles of contract law, according to which a contract party is entitled to involve a third party in the performance of a contractual obligation without having to obtain the consent of the party entitled to the performance. Consent, however, would be required under those general principles if, in the circumstances of the case, the party entitled to the performance had a legitimate reason to insist that the obligation should be performed by the party originally committed. Such a legitimate reason might exist when, because of special properties or capabilities of the obligated party, the performance of the obligation by a third party would in some way diminish the value of the performance. For example, the supplier of countertrade goods might consider that, because of the reputation and existing resale network of the party committed to purchase, the resale of the goods by that party was essential for establishing a long-term place for the goods in the market or for maintaining the market image of the goods.

11. [9] The participation of third parties in the fulfilment of countertrade commitments may be subject to mandatory rules. Such rules may make the participation of third parties subject to consent by the supplier, impose guidelines as to the acceptability of third parties or require governmental authorization of third-party participation. A frequent reason for such restrictions is the desire to ensure proper implementation of the countertrade transaction or to prevent the marketing of the goods in traditional export markets of the State in question.

(a) Selection of third party

12. [10] Clauses in the countertrade agreement permitting the engagement of third parties may be formulated in such a way that the party originally committed to purchase goods is free to select the third party. In such clauses it is advisable to provide that notice of the engagement of a third party must be given to the supplier in advance of the purchases by the third party.

13. [11] Sometimes the countertrade agreement limits the freedom of the party originally committed to purchase goods to select the third party. Various types of limitations may be used. For example, the countertrade agreement may name the third party, list acceptable third parties, or stipulate the criteria to be followed in selecting the third party. Where the countertrade agreement names the third party or contains a short list of potential third parties, the countertrade agreement may provide for the selection of another party if the identified third parties are not in a position to purchase the goods.

14. [12] Another way of limiting the freedom to select a third party is to provide that the party originally committed to purchase goods is not permitted to engage a third party without the consent of the supplier. To expedite the designation of the third party, it may be agreed that the supplier will be deemed to have consented to the designation unless an objection is raised within a specified period of time. The countertrade agreement may indicate the type of information about a proposed third party that the party originally committed to purchase is obligated to furnish to the supplier (e.g., financial standing of the proposed third party and type and quantity of goods to be purchased). In order to limit the discretion of the supplier, the countertrade agreement may identify the types of objections that would be acceptable. Such acceptable objections might be, for example, that the proposed third party is already the supplier's trading partner, that the third party is selling goods produced by competitors of the supplier, or that the third party previously has failed to meet an obligation owed to the supplier or has been involved in a dispute with the supplier.

15. [13] The supplier may have various reasons for wishing to limit the freedom of the party originally committed to purchase in the selection of a third party. One category of reasons is aimed at preventing the selection of certain third parties. For example, restrictions may be designed to prevent sales to existing customers from being counted towards fulfilment of the countertrade commitment, to prevent the engagement of persons active in a particular market (e.g., because of existing distributorship agreements in the market or because of rules applicable to trade with that country), or to ensure that goods requiring special precautions in their use are not purchased by parties not trained to handle them. The other category of reasons is aimed at bringing about the selection of certain third parties. For example, a restriction may be designed to obtain the selection of a third party from a particular country or market or of a third party with experience in particular products or markets (e.g., because the supplier wishes to introduce the goods in a market).

16. [14] The parties should bear in mind, however, that a limitation on the purchaser's freedom to select a third party may have disadvantages. For example, the party originally committed to purchase goods might have to factor into the costs of the transaction the risk that the fee charged by the third party in connection with the purchase of the countertrade goods (see below, paragraphs 30 to 36) might be higher than fees charged by other third parties or the risk that the third party will fail to make the purchases. The parties may agree that some of these risks will be assumed by the supplier who insists on the selection of a particular third party. For example, it may be agreed that the liability of the party originally committed under the liquidated damages or penalty clause would be reduced to the amount that that party could recover from the third party.

(b) Liability for fulfilment of countertrade commitment

17. [15] It is advisable for the parties to the countertrade agreement to address in the countertrade agreement the question of who would be liable to the supplier in the event of a failure by the third party to make the purchases needed to fulfil the countertrade commitment. The answer to that question depends on whether the third party has made a commitment to purchase goods only to the party engaging the third party or whether the third party has also made a commitment to the party who is to supply the goods (see above, paragraph 6).

18. [16] When the third party's commitment is made only to the party originally committed, the party originally committed remains liable to the supplier for its countertrade commitment even though the third party has been engaged. When, however, the third party makes the commitment both to the party originally committed and to the supplier, two approaches with respect to the commitment of the party originally committed may be considered. One approach is to stipulate in the countertrade agreement that the commitment of the party originally committed to purchase is to be maintained; in such a case, both the party originally committed and the third party will be liable to the supplier for the fulfilment of the commitment, and, ultimately, the party originally committed and the third party would settle the question of responsibility between themselves pursuant to their contract. Such an approach might be appropriate where the third party's commitment to the supplier to conclude future purchase contracts is not supported by the same guarantees as is the countertrade commitment of the party originally committed, or where the supplier has had no experience or has had unsatisfactory experience in dealing with the third party. The other approach is to stipulate that, upon the assumption of the commitment by the third party, the party originally committed will be released from the countertrade commitment, leaving only the third party liable to the supplier for the conclusion of future contracts. In order to implement such a substitution of the party liable to the supplier, the parties may agree on a transfer of the countertrade commitment from the party originally committed to the third party. The general contract law of most countries contains rules on transfers of contractual obligations that would be relevant to a transfer of a countertrade commitment. An alternative method of substituting the party liable to the supplier would be for the party originally committed and the supplier to agree to terminate their countertrade commitment at the moment the third party assumes a commitment to conclude future contracts with the supplier. To ensure that the original countertrade commitment is not terminated before the third party's commitment becomes effective, it is advisable to stipulate in the countertrade agreement that the termination would not take effect until the third party's commitment had become effective.

19. [17] As noted below in paragraph 22, third parties sometimes limit their commitment to a promise to exercise "best efforts" to make the purchases. Where it is agreed that the countertrade commitment of the party originally committed is to be terminated when the third party commits itself to enter into a future contract with the supplier, it would be in the interest of the supplier to agree to such a replacement of the party committed to purchase only if the commitment of the third party is a commitment to actually purchase goods rather than a "best efforts" type of commitment. If the third party were to make only a "best efforts" commitment, the supplier would have limited assurance that the conclusion of the supply contract would take place.

20. [18] Guarantees issued to support fulfilment of countertrade commitments are normally formulated in such a way that they cover only the obligation of the party originally committed. Therefore, if the supplier wishes to have the third party's commitment secured, it is advisable that the countertrade agreement require that the guarantee be modified or that a new guarantee be issued. It is also advisable that there be an indication of the consequences if the guarantee cannot be modified or an appropriate new guarantee cannot be procured.

2. Contractual relationship between party originally committed and third party

(a) Third party's commitment to purchase goods

21. [19] When the party originally committed to purchase intends to engage a third party to make the purchases, those two parties should reach an understanding as to the type of commitment to be made by the third party.

22. [20] Two types of commitment by third parties to parties originally committed are used in practice. One type is a promise that, subject to the terms of the engagement of the third party, the countertrade goods will actually be purchased. The other type of commitment is a promise by the third party that an effort will be made to purchase goods without an assurance that the effort will be successful. The third party may not be willing to make a full commitment because of uncertainty as to whether an end-user for the goods could be found or whether the purchase price of the goods would be competitive. Such a promise only to make an effort may be described by terms such as "serious intention", "best endeavours", "best efforts", or "good-faith efforts" or by a clause to the effect that the third party will purchase the goods if an end-user for the goods can be found. If the third party fails to purchase the goods, it can exonerate itself from the consequences of the failure merely by showing a good faith effort to carry out its mandate. The party originally committed to purchase the goods may find the participation of the third party on a "best efforts" basis acceptable if there is reason to expect that the third party will fulfil the mandate (e.g., because of the third party's record or because the anticipated purchase and resale prices are likely to make the purchase commercially attractive).

23. [21] Sometimes the terms of the contract engaging the third party require the third party to make a commitment directly to the supplier to conclude future contracts (see above, paragraphs 6 and 17).

24. [22] The terms under which the third party is engaged should be coordinated with the terms of the countertrade agreement. The need for coordination exists in particular with respect to the type, quality, quantity and price of the countertrade goods. A problem may arise, for example, if the third party commits itself to purchase goods of a standard quality at a world market price, while the countertrade agreement specifies a different level of quality or price. In such a case, it may occur that the supplier makes available goods that conform to the countertrade agreement but that the third party is justified in refusing to purchase because the goods do not conform to the terms of the contract between the party originally committed and the third party. That would leave the party originally committed to purchase liable to the supplier for non-fulfilment of the countertrade commitment without the possibility of indemnification from the third party.

25. [23] Furthermore, a problem may arise when the countertrade agreement does not contain an assurance as to the availability of the goods but the third party, relying on its contract with the party originally committed, expects the goods to be made available. When such inconsistency exists, the party engaging the third party may be liable to the third party for a failure on the part of the supplier to make the goods available.

26. [24] When the countertrade agreement and the terms of the engagement of the third party both contain an assurance as to the availability of goods, the party originally committed may be liable to the third party for a failure by the supplier to make the goods available. In such a case, the party originally committed would be interested in making the assurance of the availability of the goods subject to a liquidated damages or penalty clause or secured by a guarantee.

27. [25] It is advisable for the contract by which the third party is engaged to reflect any restriction on the resale of goods set out in the countertrade agreement. Otherwise, the party originally committed to purchase may be liable for a resale of the goods by the third party in violation of a restriction set out in the countertrade agreement without the benefit of indemnification from the third party.

28. [26] In some cases, the party originally committed may wish to have an opportunity to make alternative arrangements to fulfil the countertrade commitment in the event that the third party fails to make the necessary purchases. This could be achieved by setting a deadline for purchases to be made by the third party that precedes the deadline for the fulfilment of the countertrade commitment that is binding upon the party originally committed. If the party originally committed wishes to have such an opportunity, it would be advisable, in negotiating the countertrade agreement, to ensure that the fulfilment period is of a sufficient length so as to allow the third party adequate time to make the purchases, as well as to allow time for alternative arrangements to be made should the third party fail to make those purchases.

29. [27] It is advisable to make it clear in the contract for the engagement of the third party whether it is up to the third party to carry out all aspects of the negotiation with the supplier relating to the conclusion of the future contract, or whether the party originally committed to purchase the goods should participate in some way in the conclusion or performance of the contract. It may be provided, for example, that the party originally committed to purchase must approve or at least be informed of a particular aspect of the purchase of the goods (e.g., the price or the destination of the goods).

(b) Third party's fee

30. [28] In return for the third party's commitment to purchase goods, the party originally committed may have to pay a fee to the third party. A fee, to be agreed upon in the contract between the party originally committed and the third party, is normally required when the price of goods to be purchased by the third party is not competitive and the resale of the goods would therefore not be profitable to the third party without the payment of a fee. Such a fee is referred to in practice by expressions such as "commission", "disagio", "subsidy", "discount", "premium", or "compensation". The amount of the fee would depend in particular on the demand for the type of goods in question and on the expected difference between the purchase price and the resale price of the goods. The amount of the fee may also be affected by the cost of any guarantee that the third party would have to procure to cover its liability either to the party originally committed or to the supplier, or to both, for a failure to make the necessary purchases.

31. [new paragraph] In some jurisdictions, when a governmental agency is engaging a third party to purchase goods or when a governmental agency is being engaged to purchase goods, mandatory restrictions apply to the payment of a fee by or to the governmental agency.

32. [29] The fee may be calculated as a percentage of the price of the purchases to be effected by the third party or as an absolute amount per unit or quantity of goods. Sometimes a combination of the two methods is used. If the fee is calculated as a percentage of the price of the goods, it is advisable for the parties to be clear as to the amount on the basis of which the fee is to be calculated (e.g., whether any transport or insurance costs form part of that price).

33. [30] At the time the third party is engaged to conclude the future supply contracts, it may be difficult, due to price fluctuations, to predict the resale price. The parties may therefore provide for a variable fee, to be determined on the basis of the actual difference between the prices, increased by an agreed percentage or amount to cover the third party's costs. Depending upon the underlying commercial circumstances, the parties may wish to consider the possibility that the resale price might rise to a level at which the resale of the goods is profitable for the third party. If this possibility is taken into account, the third party would have to pay an amount to the party originally committed to purchase the goods corresponding to the extent to which the actual resale price increased above the anticipated resale price. Such an amount due from the third party is sometimes referred to as a "negative disagio".

34. [31] It is advisable to specify the point of time when the fee becomes due. It may be provided, for example, that the fee becomes due when the third party is engaged, upon the conclusion of the supply contract between the supplier and the third party, upon the opening of a letter of credit on the instructions of the third party in favour of the supplier, or at the time of payment by the third party to the supplier. Sometimes it is agreed that specified percentages of the fee are payable at different points of time. For example, it may be agreed that a certain percentage of the fee is payable upon the engagement of the third party, a certain percentage upon the conclusion of the contract between the third party and the supplier, and the remainder upon payment by the third party for the goods. When the fee is to be paid subsequent to the conclusion of the contract between the party originally committed and the third party, the third party may request a bank guarantee to secure the obligation to pay the fee.

35. [32] It is advisable for the contract engaging the third party to stipulate whether the contractual relationship between the third party and the party originally committed would be affected by a termination or reduction of the countertrade commitment of the party originally committed. A termination or reduction of the countertrade commitment may result, for example, from the termination of the export contract (see chapter XIII, "Failure to complete countertrade transaction", paragraph). The third party may be interested in completing the purchase and earning the fee irrespective of the fate of the countertrade commitment of the party originally committed, particularly when expenses have been incurred in locating an end-user, when an end-user has been promised the goods or when the goods have actually been purchased and resold. The party engaging the third party, on the other hand, may be interested in being able to terminate the engagement of the third party in the event that the countertrade commitment is terminated.

36. [new paragraph] Sometimes it is agreed that the payment of the fee is to be shared by the party committed to purchase and the supplier. In such a case, the details concerning the sharing, including any limit to the costs to be borne by the supplier, should be dealt with in the countertrade agreement.

(c) "Hold-harmless" clause

37. [33] The party originally committed to purchase goods may be liable to the party to whom that commitment is owed when the third party fails to make the anticipated purchases (see above, paragraphs 17 and 18). A party originally committed to purchase goods engaging a third party may therefore wish to include in its contract with the third party a "hold-harmless" clause. According to such a clause, the third party would have to indemnify the party originally committed to purchase for any liability to the supplier resulting from non-fulfilment of the countertrade commitment for reasons imputable to the third party. The parties may also stipulate that the "hold-harmless" clause would protect the party originally committed to purchase goods in the event of a violation by the third party of a restriction on the resale of the goods set out in the countertrade agreement and reflected in the contract engaging the third party. It may be agreed that the party originally committed to purchase the goods is to give the third party notice when a claim is raised that may result in the third party's liability under the "hold-harmless" clause.

(d) Exclusivity of third party's mandate

38. [34] It is advisable for the party originally committed and the third party to indicate in their contract whether the third party is to be the only party engaged or whether the party originally committed reserves the right to engage an additional third party for the purpose of fulfilling the same countertrade commitment. A third party could be given an exclusive mandate with respect to all the purchases to be made in fulfilment of the countertrade commitment or exclusivity could be given only with respect to a particular type of goods, a particular supplier, or a particular territory where the goods are to be purchased or resold.

39. [35] When the third party is given an exclusive mandate, the party originally committed may wish to reserve the right to declare the mandate as non-exclusive if by a specified time before the end of the fulfilment period the third party has not purchased an agreed quantity of goods.

40. [36] When the quantity of goods to be purchased is particularly large, it might be agreed that during a specified period of time the third party is not permitted to purchase the same type of goods from other sources. A rationale for such a restriction may be the desire to avoid a temporary oversupply in the market in which the third party plans to resell the goods, or a desire to compel the third party to concentrate its efforts on the fulfilment of the commitment in question.

C. Supply of countertrade goods

41. [37] Sometimes, a party who purchases goods in one direction, does not supply goods in the other direction. Instead, one or more third parties are designated to supply the goods. There are two types of transactions in

which such an approach may be used. One type is a transaction in which the party purchasing goods in one direction assumes a commitment for the supply of goods in the other direction, but because of difficulties in making the agreed goods available designates a third party to supply the agreed goods. The other type is an indirect offset transaction as described in chapter II, "Scope and terminology of Legal Guide", paragraph 17. In indirect offset transactions it is foreseen at the time of the conclusion of the export contract and of the countertrade agreement that the importer (often a governmental agency) will not counter-export goods and that the party committed to counter-import will have to locate third parties willing to supply goods. Those third parties are normally not bound by any commitment to conclude supply contracts with the counter-importer.

42. [38] In a transaction involving a third-party supplier, payment obligations under the supply contracts in the two directions are often settled independently. Payment in such a manner does not raise issues specific to countertrade. However, issues specific to countertrade do arise when the parties decide to link payment in the two directions so that the proceeds of the supply contract in one direction are used to pay for the supply contract in the other direction. For a discussion of such linked payment mechanisms, see chapter IX, "Payment", paragraphs 68, 75 and 76.

43. [39] When the possibility exists that a third party may be involved in the supply of goods, it is advisable for the countertrade agreement to address the means by which the third party supplier is to be selected and the consequences of a failure by the third party to make the agreed goods available.

44. [40] Different approaches may be used for the selection of the third party supplier. One approach is for the countertrade agreement to name the third party. Another approach is for the countertrade agreement to stipulate that the third party supplier is to be agreed upon at a later date. Yet another approach is to leave the selection of the third party to one of the parties to the countertrade agreement.

(a) Selection of third party by party committed to purchase

45. [41] It often occurs in offset transactions that the selection of the third party supplier is left to the party committed to purchase. That selection may be restricted by guidelines established in the countertrade agreement requiring the selection of suppliers from particular geographical regions or industrial sectors, or of suppliers of specific types of products or services. Such guidelines are referred to in chapter IV, "Countertrade commitment," paragraph 28.

46. [42] When the party committed to purchase is to select the third-party supplier, it is advisable to clarify in the countertrade agreement the effect of a failure by a potential third-party supplier to conclude a supply contract. When the selection is to be made from a large number of potential suppliers, it may be stipulated that the refusal by a potential third-party supplier would not result in a release from the commitment to purchase. When the third-party supplier is to be selected from a list of identified suppliers, it may be agreed that a refusal by all the suppliers on the list to conclude a supply contract in conformity with the terms of the countertrade agreement would release the party committed to purchase from its

commitment. (For a further discussion of release from the countertrade commitment, see chapter XIII, "Failure to complete countertrade transaction", section B.)

(b) Selection of third party by party committed to supply

47. [43] In some cases, the selection of third-party suppliers is left to the party who has a right under the countertrade agreement to supply goods. This may be the case when the party purchasing goods in one direction does not engage in the sale of goods that are to be supplied in the other direction (e.g., when a government agency purchases goods in an offset transaction), does not have goods of interest to the party committed to purchase, or is uncertain as to whether it will have suitable goods at the time the supply contract is to be concluded and therefore wishes to have the option of designating a third-party supplier.

48. [new paragraph] The party committed to supply may be left free to designate the third-party supplier. This may be the case, for example, if the countertrade goods are of a standard quality and readily available. Alternatively, the countertrade agreement may provide guidelines within which the party committed to supply goods may designate the third-party supplier or the countertrade agreement may list the potential third-party suppliers. The party committed to purchase may wish to include in the countertrade agreement a clause providing that purchasing from a third party should not cause additional costs to the party committed to purchase.

49. [44] When the selection of the third-party supplier is left to the party originally committed to supply goods, the countertrade agreement may provide that the third party must be in a position to make available goods that conform to the terms of the countertrade agreement. It is advisable for the countertrade agreement to be clear as to the consequences of a failure by the third party to make the agreed goods available. It may be agreed that such a failure would release the party committed to purchase from the countertrade commitment to the extent that the third party failed to make goods available, or it may be agreed that a new supplier would be selected. When the obligation of the party originally committed to supply is supported by a liquidated damages or penalty clause, or by a guarantee, it may be clarified that a failure by the third party to make the goods available would entitle the party committed to purchase to payment under the liquidated damages or penalty clause or under the guarantee. *

50. [new paragraph] It is advisable that the obligations assumed by the third party are coordinated with the obligations under the countertrade agreement of the party originally committed to supply. This is particularly important with respect to the obligations as to the quality, quantity or price of goods to be delivered, a guarantee of availability of goods, or liquidated damages or a penalty for a failure to make the goods available. The purpose of the coordination is to ensure that the goods offered by the third party to the party committed to purchase would be in accordance with the countertrade agreement. If, for example, the third party does not make available goods that meet the level of quality stipulated in the countertrade agreement and a supply contract is therefore not entered into, the party originally committed to supply would be liable under the countertrade agreement and the party committed to purchase may be released from the countertrade commitment.

51. [new paragraph] The contract between the party originally committed to supply and the third party may include a "hold-harmless" clause, whereby the third party agrees to indemnify the party originally committed to supply for the liquidated damages or a penalty that might have to be paid under the countertrade agreement as a result of a failure of the third party to make the agreed goods available.

52. [new paragraph] In some transactions, the party originally committed to supply and the third-party supplier agree that a commission will be paid by the third-party supplier to the party originally committed for the opportunity to market goods.

D. Multi-party countertrade

53. [45] There are three types of countertrade transactions that involve more than two parties but are distinct from the transactions covered in sections B and C of this chapter.

54. [46] One type is a tripartite transaction in which a party who supplies goods in one direction does not, at any point in the transaction, make a commitment to purchase goods in the other direction; instead, that commitment to purchase is assumed from the outset by a third party. By contrast, section B covers cases in which a party, after having assumed a commitment to purchase goods, engages a third party to make those purchases. A tripartite structure of this first type may be used, for example, in a buy-back transaction in which the exporter of the production facility does not wish to become involved in the purchase of the resultant products and there is a need, in order to secure financing, to have, at the outset, a third party committed to purchase those products. A tripartite transaction of this type may be initiated through the conclusion by the three parties of an agreement stipulating their commitments to enter into the future supply contracts and then to conclude the supply contracts in the two directions. Another approach is for the exporter and the importer to conclude a contract for the supply of goods in one direction, while at the same time the third-party purchaser (counter-importer) and the counter-exporter enter into a commitment to conclude a future contract for the supply of goods in the other direction.

55. [47] A second type of multi-party transaction is a tripartite arrangement in which a party who purchases goods in one direction does not, at any point in the transaction, assume a commitment to supply goods in the other direction; instead, a third-party supplier assumes, at the outset, a commitment to supply goods. This type of tripartite transaction is distinct from the two types of transactions covered in section C: transactions in which a party, after having assumed a commitment to supply goods, designates a third party to supply those goods, and indirect offset transactions, in which the counter-importer makes a commitment to the importer to negotiate supply contracts with potential suppliers who have not made a commitment to conclude supply contracts with the counter-importer. One contractual approach for this type of tripartite transactions is for the three parties to conclude an agreement stipulating their commitments to enter into the future supply contracts and then to conclude the supply contracts in the two directions. Another approach is for the exporter and the importer to conclude a contract in one direction simultaneously with the assumption by the third-party purchaser (counter-importer) and the counter-exporter of a commitment to conclude a future contract for the supply of goods in the other direction.

56. [48] In many cases, a feature of the tripartite transactions described in the previous two paragraphs is the linkage of payments for the supply contracts in the two directions. The use of such linked payment mechanisms is discussed in chapter IX, "Payment", paragraphs 68, 75 and 76.

57. [49] In a third type of multi-party transaction, the supply contract in one direction is concluded by one set of parties and the supply contract in the other direction is concluded by two other parties. Such a four-party countertrade transaction may be established when the parties to a contract for the supply of goods in one direction are not themselves in a position to conclude a supply contract in the other direction but are interested in the conclusion of such a supply contract. There may be interest in such an arrangement because the conclusion of the second supply contract would enable the parties to link payments for the contracts in the two directions so as to avoid or reduce cross-border currency transfers (linkage of payments in four-party transactions is discussed in chapter IX, "Payment", paragraphs 69, 75 and 77). Another reason for being interested in such an arrangement may be that the supply of goods in one direction is subject to a mandatory requirement of a purchase of goods in the other direction.

58. [new paragraph] It is advisable for the parties to consider at the outset of the transaction the question whether the failure to conclude or perform one of the supply contracts should have an effect on the obligation to conclude or perform another supply contract. This question is discussed in chapter XIII, "Failure to complete countertrade transaction", section E. For a discussion of interdependence between supply contracts when the parties have agreed on linked payments, see chapter IX, paragraphs 72 and 73.